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No. 84-1353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES P. KARTELL, HERBERT W. HORNE, JR.
and HARRY D. WILSON, JR.,
Petitioners,

v.

BLUE SHIELD OF MASSACHUSETTS, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF BALL MEMORIAL HOSPITAL INC., *et al.* *AMICUS CURIAE* SUPPORTING THE PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Applicants, by their attorneys, do hereby respectfully request permission for leave to file a brief *amicus curiae* in the above captioned proceeding. In support thereof, the following is shown:

1. Applicants, 40 Indiana hospitals, are presently involved in pending litigation against Blue Cross and Blue Shield of Indiana (hereinafter "BCBSI").[1]

2. Applicants, as members of the health care community, have a great interest in the outcome of the *Kartell* proceeding. Given that the First Circuit's opinion is drafted in all encompassing language, its holding in *Kartell* promises to have significant impact beyond the parties to

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[1] Applicants are 40 of 80 Indiana hospitals who are plaintiffs in *Ball Memorial Hospital, Inc., et al. v. Mutual Hospital Insurance, Inc., d/b/a Blue Cross of Indiana, and Mutual Medical Insurance, Inc. d/b/a Blue Shield of Indiana*, No. IP-84-1536-C (S.D. Ind.). See appendix attached hereto.

this litigation and effect the other members of the health care industry whose economic interests were not represented in that case, nor likely even contemplated. Therefore, the disposition of the petition for *certiorari* will have a far reaching impact on the entire health care industry nationwide.

3. Due to the fact that *Kartell* will have an impact on the entire health care industry, it is important that a variety of members of the health care industry be heard on the legal issues raised in *Kartell.* While the Petitioners have done a commendable job in briefing this Court, it is respectfully submitted that other members of the health care community, such as Applicant hospitals, could aid this Court in its analysis of the issues in this case.

4. In reversing the District Court's ruling in *Kartell,* the Circuit court found that Blue Shield is merely a purchaser of services. (A6)[2] This finding has an impact on future cases involving not only Section One of the Sherman Act, but also Section Two (15 U.S.C. §§ 1 or 2). The legal issues of monopsony power and Section Two of the Sherman Act were not fully addressed by the Petitioners and will be further analyzed by Applicants in their brief.

5. In conclusion, Applicants believe there are important legal issues which will not be fully addressed by the parties in this proceeding. Accordingly, it is respectfully submitted that the significance of the legal issues and the impact of this case on the health care industry in this country merits granting of the filing of Applicants' brief.

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[2] Petitioners' Appendix to its Petition For Certiorari will be cited herein as "A ___."

WHEREFORE, it is respectfully requested that Applicants be granted leave to file a brief *amicus curiae*.[3]

Respectfully submitted,

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[3] Counsel for Petitioners gave their consent to the filing of this *Amicus* Brief. Counsel for the Massachusetts Medical Society, *et. al.* consented to the filing of this Brief. Counsel for Respondents was contacted but would not consent to the filing of this Brief. Counsel for the Massachusetts Commissioner of Insurance consented to the filing of this Brief.

APPENDIX OF *AMICUS CURIAE*

BALL MEMORIAL HOSPITAL, INC.

CAYLOR-NICKEL HOSPITAL, INC.

DEACONESS HOSPITAL, INC.

ELKHART GENERAL HOSPITAL

GOSHEN HOSPITAL ASSOCIATION, INC., d/b/a GOSHEN GENERAL HOSPITAL

KING'S DAUGHTERS' HOSPITAL

LAFAYETTE HOME HOSPITAL, INC.

MARION GENERAL HOSPITAL

MEMORIAL HOSPITAL OF FLOYD COUNTY

MEMORIAL HOSPITAL OF MICHIGAN CITY

MEMORIAL HOSPITAL OF SOUTH BEND, INC.

MERCY HOSPITAL, INC.

METHODIST HOSPITAL OF INDIANA, INC.

OUR LADY OF MERCY HOSPITAL

SOUTH BEND OSTEOPATHIC HOSPITAL

ST. CATHERINE HOSPITAL OF EAST CHICAGO, INDIANA, INC.

ST. JOSEPH MEMORIAL HOSPITAL OF KOKOMO, INC.

ST. JOSEPH'S HOSPITAL (FORT WAYNE)

ST. JOSEPH'S MEDICAL CENTER

ST. MARGARET HOSPITAL

ST. MARY MEDICAL CENTER, INC. (GARY)

ST. MARY'S MEDICAL CENTER OF EVANSVILLE, INC.

TERRE HAUTE REGIONAL HOSPITAL

WESTVIEW HOSPITAL

THE BOARD OF TRUSTEES OF BLACKFORD COUNTY HOSPITAL

THE BOARD OF TRUSTEES OF CLINTON COUNTY HOSPITAL

THE BOARD OF TRUSTEES OF DAVIESS COUNTY HOSPITAL

THE BOARD OF TRUSTEES OF DECATUR COUNTY MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF GOOD SAMARITAN HOSPITAL

THE BOARD OF TRUSTEES OF GREENE COUNTY GENERAL HOSPITAL

THE BOARD OF TRUSTEES OF HANCOCK MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF HARRISON COUNTY HOSPITAL

THE BOARD OF TRUSTEES OF HENRY COUNTY MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF HUNTINGTON MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF JOHNSON COUNTY MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF PUTNAM COUNTY HOSPITAL

THE BOARD OF TRUSTEES OF RIVERVIEW HOSPITAL

THE BOARD OF TRUSTEES OF STARKE MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF TIPTON COUNTY MEMORIAL HOSPITAL

THE BOARD OF TRUSTEES OF WITHAM MEMORIAL HOSPITAL

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae is comprised of forty out of one hundred and fifteen acute care hospitals in the State of Indiana, ranging from primary care community hospitals to tertiary care referral centers. As integral members of the health care industry in this country, hospitals generally have a fundamental interest in any decision before this Court which has the potential for addressing the dynamic relationships between the components of the health care community from an antitrust perspective. The manifest involvement of the hospitals now before this Court with these issues is evidenced by forty of the eighty being

parties plaintiff in *Ball Memorial Hospital, Inc., et al. v. Mutual Hospital Insurance, Inc., d/b/a Blue Cross of Indiana, and Mutual Medical Insurance, Inc. d/b/a Blue Shield of Indiana,* No. IP-84-1536-C (S.D. Ind.).

The First Circuit's ruling in *Kartell* has the potential for drastically affecting the health care industry. Even though the case dealt solely with agreements between an insurer and physicians, it promises to have impact upon all areas of health care given its all encompassing language and its failure to differentiate between the various segments of the health care industry. *Amicus Curiae* wishes to aid this Court in its decision as to whether *certiorari* should be granted by framing the issues from the hospitals' vantage point. Given that the hospitals are the other major branch of health care service providers in this country, it would be in the public interest for this Court to make its decision informed as to all the possible ramifications surrounding an issue of paramount national significance.

QUESTION PRESENTED [1]

Whether the Court of Appeals correctly held that provider contracts by which a market-dominant health insurer imposes a maximum fee schedule upon physicians are categorically lawful under Sherman Act 1, without evaluation under the rule of reason and notwithstanding the District Court's undisturbed findings, after trial, that the contracts unreasonably restrain competition in the relevant geographic market for physicians' services.[1]

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[1] The Question Presented is taken from the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit filed by James P. Kartell, *et al.* at page i. Petitioners' Appendix to its Petition For Certiorari will be cited herein as "A ___."

SUMMARY OF ARGUMENT

Issues raised by the petition for writ of certiorari have the potential for affecting the entire health care industry throughout this country. Given the likely fallout from the Court of Appeals' decision, it is essential that any case of this magnitude by adjudicated within the confines of traditional antitrust law and be decided after input from other major actors in the health care market. These actors, such as the hospitals comprising *amicus curiae* will certainly feel the consequences of this case although their dynamic role in the marketplace was not considered either by the parties or the courts below. Unless *certiorari* is granted, ambiguous signals regarding the application of the antitrust laws to the health care industry will be transmitted due to the new trails blazed by the First Circuit. Guidance is necessary from this Court to reaffirm that the antitrust laws apply with full force and effect to the health care industry, that the only consideration relevant to the evaluation of a restraint of trade is its effect on competition, that a provider agreement, like any other agreement, is not *per se* lawful and must be scrutinized under the rule of reason, and that monopsony power must be constrained when it is used to maintain or extend monopoly power. Only through this guidance can the health care industry continue to benefit from enhanced competition unencumbered by an otherwise strong tendency to limit the free play of market forces.

I. This Case Should Be Heard Because it Presents Unique Policy Questions Which Are Contrary to Traditional Antitrust Analysis And Are Of Paramount Importance To The Health Care Industry.

A. The Health Care Industry Is Subject to the Same Scope of Antitrust Scrutiny as any Other Industry.

In terms of the Sherman Act's (15 U.S.C. 1 *et seq.*) fundamental concern with the promotion of competition, which has long been recognized by this Court, *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918), that absent statutory direction from Congress no more dangerous assault upon the free exchange of market forces exists than for the courts to distinguish between different industries and accord

some industries preferential treatment under the antitrust laws. Unfortunately, the Court of Appeals has given undue consideration to factors beyond competition, practically tantamount to an exemption, primarily because the validity of the restraints it was asked to rule upon arise in the health care field. In two different sections of its opinion, the court emphasized its hesitancy to apply traditional antitrust analysis to the health care field.[2] While the Circuit Court's concern over the health care industry may be justified, it has no place in a traditional antitrust analysis. In *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978) this Court held that a rule of reason "inquiry is confined to a consideration of impact on competitive conditions." *Id.* at 690. At this point in time, neither Congress nor the courts have provided for an exemption to the health care industry from the antitrust laws. Nowhere was this principle more forcefully stated than in *Arizona v. Maricopa County Medical Society,* 457 U.S. 322 (1982), where this Court held an agreement among competing physicians to be *per se* unlawful under Section One of the Sherman Act. The fact that doctors—rather than non-professionals—were the parties to the price fixing agreement was irrelevant.

The Court stated:

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum.* In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price fixing agreements are concerned, establishes one uniform rule applicable to

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[2] "The rising costs of medical care, the possibility that patients cannot readily evaluate (as competitive buyers) competing offers of medical service, the desirability of lowering insurance costs and premiums, the availability of state regulation to prevent abuse—all convince us that we ought not create new potentially far-reaching law on the subject." (A14) The court later stated that "the subject matter of the present agreement—medical costs—is an area of great complexity where more than solely economic values are at stake." (A19)

> all industries alike." 310 U.S., at 222. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification for price-fixing agreements, *Id.*, at 220 . . ."

Id. at 349.

The Court of Appeals' special tolerance for restraints of trade imposed in the health care field is therefore completely at odds with the decisions of this Court and the well accepted intent of the Sherman Act. By transmitting a signal to the health care community that such restraints will be granted special judicial leniency, if not exempted from challenge entirely, then an industry which is finally entering a competitively driven phase will have no incentive to do so; the impact of cases like *Maricopa* and *National Society of Professional Engineers* will be lost.

Ironically, even though the Court of Appeals was concerned about creating "far-reaching" law, its departure from a traditional rule of reason analysis may reach much farther than it could have anticipated. If the petition for writ of *certiorari* is not granted and the First Circuit's ruling remains intact, the entire health care industry could be drastically affected. Until such time as Congress determines to act upon these issues, the courts should continue a traditional rule of reason analysis.

B. Social Welfare Is An Impermissible Basis to Decide Antitrust Cases.

The Court of Appeals was greatly concerned with the rising costs of health care and the resulting effects on the public. This Court has time and time again rejected precisely this same type of argument. In *National Society of Professional Engineers, supra,* the National Society of Professional Engineers argued that its restraint on bidding on engineering services served to protect the public by preventing the production of inferior work. Justice Stevens, writing for the Court, rejected this argument, stating,

> It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on

> the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

Id. at 695.

The policy argument raised by the Petitioners and rejected by the Court in *National Society of Professional Engineers* is indistinguishable from the Court of Appeals' reliance on public interest concerns in *Kartell.* The only difference is that, in *National Society* this Court chose to ignore these concerns whereas the *Kartell* Court based its decision upon them.

The First Circuit in *Kartell* also placed emphasis on the fact that not only was it analyzing medical costs, but the costs at issue were low costs, not high ones. (A18-19). While the argument that lower costs are in the public benefit is appealing at first blush, an analysis of antitrust precedent leads to a wholly different result. In *Arizona v. Maricopa County Medical Society, supra,* this Court held that the mere fact that the "price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services." *Id.* at 349. This Court went on to reject the position of Blue Shield and the Court of Appeals, i.e., that extracting lower prices enhances competition:

> We do not perceive the respondents' claim of procompetitive justification for their fee schedules to rest on the premise that the fee schedules actually reduce medical fees and accordingly reduce insurance premiums, thereby enhancing competition in the health insurance industry. Such an argument would merely restate the long rejected position that fixed prices are reasonable if they are lower than free competition would yield.

Id. at 352, n.25.

The competitive evil of artificially lowering costs has been addressed in a variety of factual circumstances much as *Arizona v. Maricopa County Medical Society, supra,* wherein a horizontal agreement between doctors to fix maximum prices was held *per se* unlawful under Section One of the Sherman Act. Similarly, in *Albrecht v. Herald Co.,* 390 U.S. 145 (1968) an Agreement

to fix maximum resale prices was held to be a *per se* violation of Section One of the Sherman Act. This Court there rejected the notion that "a price ceiling was necessary to protect the public from price gouging by dealers . . ." *Id.* at 153. Furthermore, this Court has long held that a buyer's use of monopsony power to obtain lower costs than its competitors is violative of Section Two of the Sherman Act. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948)

These cases are in striking contrast to the Court of Appeals' reliance on the fact that it was dealing with low prices rather than high prices. The First Circuit's rationale is therefore contrary to decades of antitrust precedent of this Court.

Finally, the fact that Blue Shield may have good intentions in that it allegedly is attempting to keep health care costs down is of little importance in an antitrust analysis. In *N.C.A.A. v. Board of Regents of the University of Oklahoma*, this Court stated that it is "well-settled that good motives will not validate an otherwise anticompetitive practice."[3] The contention that Blue Shield is promoting lower health care costs and benefiting the public is of no import where the method it utilizes to bring about this end has anticompetitive effects.

II. THE COURT OF APPEALS HAS IMPERMISSIBLY CREATED AN IRREBUTTABLE PRESUMPTION OF LEGALITY WHENEVER PROVIDER AGREEMENTS ARE IN ISSUE.

The central issue on appeal embraced by the parties and both courts below is whether an agreement between an insurer and a provider of health care services (hereinafter referred to as a provider agreement) can violate the Sherman Act by containing terms and conditions which unreasonably restrain trade.[4] In analyzing this issue the Court of Appeals took a markedly different approach than the District Court. Leaving

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[3] 104 S.Ct. 2948, 2960, n. 23 (1984).

[4] Although Section Two of the Sherman Act was tangentially touched upon in both decisions below, the Section Two argument was treated in summary fashion and did not play any role in either court's analysis.

the District Court's Findings of Fact in place, the First Circuit focused solely on whether Blue Shield was a purchaser of physicians' services. To the Court of Appeals, the only "relevant antitrust facts are that Blue Shield pays the bill and seeks to set the amount of the charge." (A10).

The First Circuit opinion is therefore a tautology. The Court of Appeals reversed the District Court because the First Circuit believed there can be no restraint of trade, no "third force intervening in the marketplace", (A6) when Blue Shield is characterized as a purchaser. Thus, without inquiry into the competitive consequences of the restraint in issue the First Circuit has established a standard of *per se* lawfulness for all restraints imposed by "purchasers" on their sellers.

The importance of the First Circuit's decision cannot be overstated. With one fell swoop this decision has eliminated the rule of reason from Section One analysis, let alone the relevance of market power in that analysis, (*See* A11), whenever the term in question arises out of the relationship between buyers and sellers. At the same time, the First Circuit has eliminated Section Two as an alternative cause of action in this context. The court stated, "whether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point even in the case of a monopolist . . . We can find no relevant analytical distinction between this type of purchasing decision and the practice before us even on the assumption that Blue Shield possesses market power." (A14) While professing a reluctance to blaze new trails, (A19) the First Circuit without any economic analysis has effectively excluded provider agreements from the reach of the antitrust laws.

From a policy perspective, this decision has dramatic and far reaching implications. There is a constant tension between providers of health care services on the one hand and purchasers, such as insurers, on the other. This tension is coming to a peak for hospitals across the country with a movement away from traditional methods of health care financing and health care delivery systems towards various alternative delivery systems. One such system is generically known as a preferred provider organization. Depending on who sponsors the system,

hospitals are either asked or coerced to submit bids to become "preferred providers" at a discount from their prevailing charges. In return the sponsor promises to shift its insureds away from those hospitals which did not bid or were not selected and to steer them to those "preferred hospitals". Insureds are motivated to utilize "preferred" hospitals by linking complete insurance coverage to the selection of a "preferred" hospital. If a non-preferred hospital is utilized, the insured will likely have to cover some, if not all of the expenses.

While the emergence of these systems is generally procompetitive, these arrangements, like any other lawful device, are susceptible to abuse. Indeed the potential for abuse is great in that these alternative delivery systems are being brought to market by all types of new entrants, particularly the health care providers themselves, including the hospitals. The traditionally dominant forces in the health care insurance market are quite sensitive to the small in-roads these systems have made. The hospitals before this Court as *amicus curiae*, representative of hospitals throughout the country, are concerned by the First Circuit's limitation of both sections of the Sherman Act to redress these abuses as they arise.

If this Court denies *certiorari*, then the availability of an antitrust remedy to cure competitive evils in the health care insurance market and services markets will be greatly undermined, severely prejudicing atomistic groups like the physicians in the case *sub judice* or the hospitals whose financial viability is continually threatened by overcapacity. Only by hearing this case can this Court address the First Circuit's broad brushed disposition of provider agreements and provide guidance for the lower courts as to how provider agreements in all their possible formulations should be governed by the antitrust laws.

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER ITS PREVIOUS DECISIONS EXCLUDE PROVIDER AGREEMENTS FROM TRADITIONAL ANTITRUST ANALYSIS.

The Court of Appeals reversed the District Court because the conduct complained of related to Blue Shield's position as a purchaser of physician services. The First Circuit's reasoning

rests strictly on a statement in *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979):

> The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield.

440 U.S. at 214 (*cited* in *Kartell* at A6).

This Court in *Royal Drug* expressly stated that the only issue before the Court was "whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the 'business of insurance' within the meaning of Section 2(b) of the McCarran-Ferguson Act." *Id.* at 210. That the lower courts have nonetheless seized upon *Royal Drug* as substantive authority for upholding provider agreements is particularly incomprehensible given the Court's further statement that "[w]hether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us." *Id.* (emphasis in original, footnote omitted).

As if these explicit statements were not enough, in *Arizona v. Maricopa County Medical Society, supra,* this Court expressly left open consideration of the issues presented by this case. The Court there stated:

> Nor does this case present the question of whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

Id. at 353 n. 26.

Despite this Court's consistent statements that the issue now before it was not being decided, some lower courts, especially, the First Circuit in *Kartell,* adopted the *Royal Drug* language and transferred it into a conclusive presumption. Despite the recognized judicial reluctance to allow mere labels to be outcome determinative, *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1952), *Simpson v. Union Oil Co.*, 377 U.S.

13 (1964), the categorization of a contract as one between buyers and sellers has achieved exactly that—the label dictates the result.[8]

IV. THE FIRST CIRCUIT STRAYED FROM TRADITIONAL SECTION ONE ANALYSIS BY COMPLETELY IGNORING THE RULE OF REASON IN ESTABLISHING A STANDARD OF *PER SE* LEGALITY.

Just as this Court has early on recognized that Congress would not have intended a literal interpretation of the word "every" in analyzing restraints under Section One, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), this Court has implicitly recognized that Congress could not have intended that entire segments of the economy, in this case provider agreements, be deemed *per se* lawful and the rule of reason abandoned. Indeed, in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., et al*, 394 U.S. 700 (1969) (per curiam) this Court reversed the grant of summary judgment for defendants after extensive pretrial discovery. The Court stated that "[t]he reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment." *Id.* at 702-703.

Norfolk Monument is particularly applicable to the case at bar because the Court of Appeals reversed a District Court which was most familiar with the facts in dispute after having

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[8] In the past, even where the label was not *per se* determinative of the result, the Court of Appeals as in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) affirmed the District Court's incorporation of the rule of reason in upholding the restraint. Thus where plaintiffs have plead more than a *per se* violation provider agreements have been upheld only after judicial scrutiny of the particular restraint in issue. Even in the arena of non-price vertical restraints, which have routinely been upheld, this Court has held that the rule of reason is still applicable. *See, Continental of Virginia, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). At the very least there is a dramatic conflict between the Circuits, but in all likelihood, the First Circuit's reversal without any rule of reason analysis is unsupported by the caselaw.

sat for 37 days, heard 38 witnesses, reviewed 281 exhibits and issued a 55 page decision condemning the restraint.[6]

Even if Blue Shield is deemed a buyer, that categorization is beside the point. The District Court's decision condemning the restraint did not turn on the wooden distinction raised by the First Circuit as to the relationship between the parties. Whether Blue Shield purchases services, or reimburses its insureds for the same, the District Court found no procompetitive justification for the restraint. (*See* A52). Just as importantly, the court found many anticompetitive effects accompanying the restraint. Labeling Blue Shield as a buyer does not make these effects disappear; consumers are left with the burdens imposed by the restraint resulting from treating physicians services as fungible. As the District Court aptly pointed out, the evil of the price fixing scheme in *Maricopa* was present with full force and effect in the case at bar, especially since the District Court found that Blue Shield's "usual and customary" fee methodology has been converted into a fee schedule with operational and competitive characteristics associated with such a system. (*See* A59-60).

This Court identified those evils as follows:

> In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Maricopa, 457 U.S. at 348.

The District Court on the other hand adhered to the classic formulation of the rule of reason laid down by this Court in

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[6] *See* Petition For Writ of Certiorari filed by Grant V. Rodkey, M.D., Henry Brown, M.D. and the Massachusetts Medical Society on February 25, 1985 in Docket 84-1354 at p. 4.

Chicago Board of Trade v. United States, supra, which was cited with approval in *Maricopa:*[7]

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

246 U.S. at 238.

The inquiry under the above formulation is couched in mandatory terms: "The court must ordinarily consider." The District Court, not the Court of Appeals, followed this mandate and considered facts peculiar to the industry. The District Court, not the Court of Appeals, considered the history of the restraint. The District Court, not the Court of Appeals, considered the evil believed to exist, the reason for adopting the remedy and the end sought. Thus the District Court's conclusion is no different from the other cases cited by the Court of Appeals which had considered the merits under a full rule of reason formulation.[8] It is in fact the Court of Appeals, which having totally ignored the requisite rule of reason analysis, has strayed far afield of the inquiry this Court mandates in sanctioning these restraints.[9] In light of this radical departure from traditional antitrust analysis, this Court should grant the petition for *certiorari* to redress this error.

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[7] *Maricopa,* 457 U.S. at 343 n. 13.

[8] That the other cases reached different conclusions regarding the provider agreements before them is not surprising given that, as this Court has recognized, the rule of reason is based on the facts of each particular case and little guidance should be expected from one case to another. *Maricopa* at 343.

[9] As noted above the Court of Appeals considered matters of social welfare and Blue Shield's good motives in upholding the restraint. This analysis is markedly contrary to mainstream antitrust inquiry, *N.C.A.A., supra,* being a recent example. There the Court stated, "[b]oth *per se* rules and the rule of reason are employed 'to form a judgment about the competitive significance of the restraint.'" *Id.* at 2962, *citing National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978).

V. ERRONEOUS ASSUMPTIONS REGARDING THE INTERPLAY OF MARKET POWER IN THE CONTEXT OF SECTION ONE PORTEND TO HAVE UNWARRANTED IMPACT IN THE CONTEXT OF SECTION TWO.

A. The First Circuit's Decision Should Be Evaluated Against The Broader Context of the Entire Health Care Industry.

The First Circuit's reasoning regarding the importance of market power exacerbates the nature of its errors, for this case promises to go far beyond being viewed as a Section One case and will likely have unfortunate fallout in terms of Section Two. This spillover no doubt will stem from the Court of Appeals' statement that "even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices" so long as the price was not predatory, i.e. "below incremental cost". (*See* A12).[10] This statement is in direct conflict with long established antitrust precedent. On the basis of this statement alone, *certiorari* should be granted.

Whether the First Circuit's conclusions should be allowed to stand must be viewed in the broader context of the health care industry generally. Non-profit hospitals, such as the *amicus curiae* must be viewed apart from physicians. Nonprofit hospitals by their very nature do not seek to maximize their profits. These hospitals can therefore be expected to react in a wholly different manner than do profit maximizing actors, like the physicians in *Kartell,* when they are coerced into giving an "unreasonably low price". Nonprofit hospitals may engage in cost-shifting. These institutions price their services so they will break even in the long run, and thus any reduction in rates attributable to one group of purchasers will be compensated for by raising the cost of services provided to other purchasers.

[10] A significant ambiguity exists with regard to this limited exception the First Circuit was willing to make. It is unclear whether the predatory price referred to relates to the insurance product sold or the amount the physician is to be reimbursed.

Physicians on the other hand, having already priced their services at the profit maximizing level, will not further raise their rates to other purchasers if they give Blue Shield a discount.

The competitive significance of the existence of cost shifting on the health care marketplace is profound. Even if it is legitimate, as the Court of Appeals maintains, to exercise market power to get an "unreasonably" low price, it is certainly not competition on the merits to cause the costs of servicing that discount to be shifted to competitors. This leveraging of market power to increase a competitor's costs is just a variation on the price squeeze theme first articulated by Judge Learned Hand in *United States v. Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1945). The Court of Appeals for the Seventh Circuit recently condemned a price squeeze in *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976 (7th Cir. 1980), *cert. denied,* 449 U.S. 1096 (1981). The impact of this cost shifting is to foreclose entry, and maintain the market shares of the dominant insurers. In the hospital services market the effect of cost shifting is particularly complicated given that hospitals are now starting to compete with traditional providers of prepaid health care financing by offering their own alternative delivery systems.

The First Circuit's assertions, divorced as they are from competitive realities in the health care marketplace, may chill competition in this industry. This Court should grant *certiorari* to address the First Circuit's unwarranted and broad based treatment of this issue, for significantly restraining competition in an industry, unlike the so-called benefit of monopoly pricing's attracting higher quality raw materials, is not "good", nor should it even be tolerated.

B. The First Circuit's Articulation of Acceptable Monopolistic Conduct Runs Contrary to Supreme Court Precedent.

The offense of monopolization was defined by Justice Douglas in *United States v. Grinnell Corp.,* 384 U.S. 563 (1966):

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monop-

> oly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.

Id. at 570-71.

While the Court of Appeals referred to the "superior product" language above, it failed to explain how the willful extraction of an unreasonably low price which has the tendency to maintain or extend market power can be considered acceptable monopolistic conduct. Furthermore, the First Circuit's formulation of the law conflicts with the Second Circuit's decision in *United States v. Aluminum Company of America, supra,* wherein Judge Hand stated:

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. . . [We] can think of no more effective exclusion than progressively to embrace every new opportunity as it opened. . .
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> * * *
>
> [N]o monopolist monopolizes unconscious of what he is doing.

Id. at 431-32.[11]

If *certiorari* is not granted, then the Court of Appeals would have effectively undermined *Alcoa* and *Grinnell.* The Court of Appeals, contrary to these cases has sanctioned monopolistic conduct designed to maintain Blue Shield's market share, conduct which the District Court determined was not supported by any procompetitive justification.

A further reason for granting *certiorari* is to give clear guidance as to the permissible scope of the exercise of monopsony power. Guidance is necessary given that the Court of

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[11] *Alcoa* was cited with approval in *Grinnel. See Grinnell,* 384 U.S. at 571.

Appeals would seemingly allow a purchaser to exercise whatever power it desired as the product of a rational firm's desire to "get the best deal possible". (*See* A16) This practically limitless buyer power is irreconcilable with this Court's decision in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

In *Mandeville,* three California sugar refiners occupying a monopolistic position in North California agreed to pay uniform prices for sugarbeets. The practice condemned by the Court was not merely the price-fixing by the dominant buyers, but the extraction of unreasonable terms and conditions made possible by the abuse of the refiners' monopoly power. In commenting on the controls imposed on the sugarbeet sellers by the refiners, this Court stated:

> Some of these controls have been built up by taking advantage of the opportunities afforded by the industry's unique character, both natural and in its general pattern and habits of organization; others by utilizing the key positions these advantages give the refiners to put contractual restraints upon the growers by their separate actions; and still greater ones by the refiners' ability by virtue of their central and dominating place thus achieved, to agree among themselves upon further restrictions.
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> * * *
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> The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible . . . A tighter or more all-inclusive monopolistic position hardly can be conceived.

Id. at 239-240.

In *United States v. Griffith,* 334 U.S. 100 (1948), this Court made clear that individual as well as concerted action by a buyer with monopoly power would constitute a violation of the antitrust laws:

> The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. *United Stated v. Griffith,* 334 U.S. at 108.

The Court went on to state that if "monopoly power can be used to begat monopoly, the Act becomes a feeble instrument indeed. Large-scale buying . . . [may not be] used to stifle competition by denying competitors less favorably situated access to the market." *Id.*

Blue Shield's abuse of its monopoly power to coerce the physicians into providing their services at prices determined by Blue Shield's fee schedule which does not reflect the cost of such services is no different from the conduct condemned in *Mandeville Farms* and *Griffith.*

By granting *certiorari* this Court can therefore clarify that *Mandeville Farms* continues to be the governing authority. Clear direction will further indicate that the First Circuit's articulation of a judicial hesitancy to interfere "with a firm's freedom to set even anticompetitve prices" is misplaced. As *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980), relied upon by the Court of Appeals, makes clear, judicial hesitancy to interfere with monopoly pricing arises from a desire to award damages only where unlawful conduct proximately caused the

injury.[12] The courts do not wish to punish a monopolist for lawful conduct. Thus when read in context, *Berkey Photo* cannot support the untenable position that a firm is free to extract unreasonably low prices without limit. As a consequence the First Circuit's so-called judicial hesitancy crumbles without the aid of a single authority on point.[13]

While any "rational enterprise" tries to "get the best deal possible", (*See* A16) the caselaw imposes restraints upon monopolists which other rational enterprises are not subject to because of their lack of market power. *MCI Communications v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1149 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983). This rule of law bespeaks of infinite wisdom because the consequences attending the actions of a monopolist are felt in geometric proportions relative to the conduct of the ordinary business enterprise. As the Court of Appeals recognized, Blue Shield is able to extract a lower price as a product of its market share, which other actors in the market are not able to obtain. It is only fair that judicial scrutiny increase commensurately with the potential impact one's actions can have on the marketplace. Action, though lawful, which extends or enhances market power violates Section Two. To hold otherwise is to invite concentrations of economic power that undermine the very entrepreneurial spirit

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[12] Judge Kaufman's statement quoted by the First Circuit can more fully be appreciated in context:

> It is true . . . that excessive prices are "injury of the type the antitrust laws were intended to prevent. . . It is equally evident, however, that more than monopoly power is necessary to make the charging of a noncompetitive price unlawful. Accordingly, a purchaser may recover only for the price increment that "flows from" the distortion of the market caused by the monopolist's anticompetitive conduct.

Id. at 297.

[13] *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927), relied upon by the Court of Appeals, is also inapposite. It has long been recognized that the Court there rejected any inquiry into the reasonablness of the prices being fixed as a defense to charges brought under Section One. It is therefore quite ironic that the First Circuit has cited this language to support closing off any inquiry in a sutuation questioning the lawfulness of prices being fixed.

that full competition inspires. To require more is to encourage the monopolist to eliminate competition before being found in violation of the Act.

CONCLUSION

It is respectfully submitted that this Court should grant the petition for a writ of certiorari to address the broad issues raised and incorrectly decided by the Court of Appeals, issues which have the potential for affecting the entire health care industry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JOHN A. BORSARI, certify that I have this 25th day of March, 1985 caused to be served a copy of the foregoing "Motion for Leave to File and Brief of Ball Memorial Hospital, Inc., *et al. Amicus Curiae*" by depositing three (3) copies of the same in the United States Mail, first class postage prepaid, addressed to the following counsel of record:

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